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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91195823
Party	Defendant NCA Biotech, Inc.
Correspondence Address	STANLEY T HSIAO NCA BIOTECH INC 4802 MURRIETA STREET CHINO, CA 91710 UNITED STATES stanleyth@ncabiotech.com, info@ncabiotech.com
Submission	Opposition/Response to Motion
Filer's Name	Stanley T. Hsiao
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Signature	/Stanley T. Hsiao/
Date	05/06/2011
Attachments	Res to Mot for Leave to Amend.pdf (8 pages)(2395913 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 77/853.842
Published in the *Official Gazette* on March 30, 2010
Mark: CHAMPIONGRO

OMS Investments, Inc.		Opposition No. 91195823
	Opposer,	
vs.		
NCA Biotech, Inc.		APPLICANT'S RESPONSE TO OPPOER'S MOTION FOR LEAVE TO FILE A FIRST AMENDED NOTICE OF OPPOSITION
	Applicant.	

Applicant hereby responds Opposer's Motion for Leave to File a First Amended Notice of Opposition as follows:

BACKGROUND

Applicant filed to register the mark "ChampionGro" with the Patent and Trade Mark Office on or about October 21, 2009. Opposer filed its Notice of Opposition on or about July 28, 2010. Applicant consented to Opposer's request to suspend the opposition to explore the possibility of settlement. Opposer claims that a settlement had been reached while Applicant disagrees. See the correspondences in Exhibit A. Among others, the proposed settlement agreement was never signed, and the proposed settlement agreement does not contain the payment term of \$6,000 which Opposer was willing to pay. On or about April 21, 2011, Opposer filed a motion to seek for leave

from the Board to amend its Notice of Opposition, not on the reason of correction, but on a disputed settlement, which occurred after the original Notice of Opposition was filed and was totally unrelated to the registrability issue of Applicant's ChampionGro mark.

DISCUSSIONS

I. Rule 408 of Federal Rules of Evidence

It has been a well established judicial policy that compromise or offer to compromise is inadmissible. Such policy is well spelt in Rule 408 of Federal Rules of Evidence. The principle has been extended to cover medical payment, plea discussions, liability insurance respectively in Rules 409, 410 and 411. The disputed settlement should not be admissible, and as a matter of law cannot be incorporated into its amended Notice of Opposition as proposed. The Notice of Opposition is the utmost important pleading in this proceeding. To allow such an amendment will be an admission of inadmissible evidence in direct violation of Federal Rules of Evidence.

II. TTAB's Jurisdiction

The TTAB is an administrative board that hears and decides adversary proceedings between two parties, namely, oppositions (party opposes a mark after publication in the *Official Gazette*) and cancellations (party seeks to cancel an existing registration).

The agency's expertise is about the registrability of a trade mark, not about contract. In this case, the Board is to decide whether Opposer has a ground to claim

Gro as its family mark in order to preclude all applications of any mark containing Gro, including Applicant's ChampionGro mark, from registration.

The agency's expertise is not about contract, and is not charged with duty to decide the validity of a contract. To allow Opposer's proposed amendment will force the Board to decide a matter outside of its subject matter jurisdiction.

CONCLUSION

Opposer is asking the Board to approve a motion which is in violation of Federal Rules of Evidence and to decide a matter which is outside of the Board's subject matter jurisdiction. Therefore, Applicant respectfully requests that Opposer's Motion for leave to File a First Amended Notice of Opposition be denied.

DATED this 3rd day of May, 2011.

Respectfully Submitted,



Stanley T. Hsiao
NCA Biotech, Inc.
4802 Murrieta St.
Chino, CA 91710
Tel: (909) 348-5133

Certificate of Service

The undersigned hereby certifies that a copy of this foregoing paper has been served upon Opposer's attorney of record and address below by First Class Mail and by email on this date.

John Gary Maynard, III, Esq.
Hunton & Williams LLP
951 East Byrd Street
Riverfront Plaza, East Tower
Richmond, VA 23219-4074
Telephone (808) 788-8200

Dated: May 3, 2011


Linn Robinson

EXHIBIT "A"

High Light Added.

Stanley Hsiao

From: Maynard, John Gary <jgmaynard@hunton.com>
Sent: Tuesday, April 05, 2011 6:39 AM
To: Stanley Hsiao
Cc: Demm, Stephen; Lim, Elizabeth A.
Subject: RE: Scotts/NCA Biotech

Mr. Hsiao

The email below was rejected by your filter because of the size of the attachments. I am resending without the attachments as you already have the attachments in your possession.

From: Maynard, John Gary
Sent: Tuesday, April 05, 2011 9:31 AM
To: 'Stanley Hsiao'
Cc: Demm, Stephen; Lim, Elizabeth A.
Subject: RE: Scotts/NCA Biotech

Mr. Hsiao

I am beginning to think you are playing games with me.

The facts could not be more clear. As set forth in my March 16 and January 14 emails, copies of which are attached for your convenience, Scotts made a settlement offer to you via an email dated November 18, which attached a draft settlement agreement. This November 18 email is attached to my January 14 email above. You responded on December 15 with a very clear counter-offer. NCA Biotech would accept all of the terms of the settlement agreement, but for two specific provisions: either (i) Scotts agrees to pay you \$6,000, or (ii) Scotts withdraws the language of the Agreement requiring NCA Biotech to recognize Scotts' rights in the GRO mark. Most notably, you proposed no other terms. Scotts accepted NCA Biotech's offer by electing the second option, and on January 14, 2011, I forwarded you a revised agreement that reflected the parties' agreement on all material terms.

Since then, you have sought to renegotiate the terms, most recently via the agreement attached to your March 29 email. This approach is not productive. A deal has already been reached and is reflected in the agreement attached to my January 14 email. I hope that NCA Biotech will sign that attached agreement, and we look forward to hearing from you by the end of the week. Should this matter not be resolved by the end of the week, Scotts will have no choice but to prosecute this matter.

From: Stanley Hsiao [mailto:stanleyth@cpbio.com]
Sent: Friday, April 01, 2011 6:47 PM
To: Maynard, John Gary
Subject: RE: Scotts/NCA Biotech

John,
I asked you on 3/16/2011:

So is it correct that your position is that you will not pay NCA Biotech any amount if you are to sign an agreement similar to what I revised?

Your clear answer on the same day was:

Yes, you understand correctly. Scotts accepted your offer on terms that required no payment of money.

It means that you would accept my version or my terms but not paying \$6,000.00.

I don't know what you are talking about now.

Stanley

From: Maynard, John Gary [mailto:jgmaynard@hunton.com]
Sent: Friday, April 01, 2011 8:20 AM
To: Stanley Hsiao
Cc: Maynard, John Gary
Subject: RE: Scotts/NCA Biotech

Mr. Hsiao

This is not what the parties agreed to.

From: Stanley Hsiao [mailto:stanleyth@cpbio.com]
Sent: Tuesday, March 29, 2011 4:55 PM
To: Maynard, John Gary
Subject: RE: Scotts/NCA Biotech

John,
It is interesting that our technology could be used by Scott Miracle-Gro in its upgraded products. It is too early to say anything yet. It is really a small world.
Our CEO is ready to accept your insistence as long as our existing marks are protected. See attached.
Stanley

From: Maynard, John Gary [mailto:jgmaynard@hunton.com]
Sent: Tuesday, March 22, 2011 2:26 PM
To: Stanley Hsiao
Subject: RE: Scotts/NCA Biotech

From our perspective, an agreement has already been reached and there is nothing more to decide. Nonetheless, the main reason I have pushed this matter is because the TTAB suspension ended on March 3 and, as such, there are several deadlines fast approaching. It is clearly in no one's interest to incur the time and expense of litigation when a settlement has been reached.
Given the approaching deadlines, if we do not hear back from you promptly, we will take appropriate actions.

From: Stanley Hsiao [mailto:stanleyth@cpbio.com]
Sent: Tuesday, March 22, 2011 5:08 PM
To: Maynard, John Gary
Subject: RE: Scotts/NCA Biotech

The insistence of your position gives our CEO a very hard time to decide. It is an issue of principle. Money is not an import issue to us. Give us more time.

From: Maynard, John Gary [mailto:jgmaynard@hunton.com]
Sent: Tuesday, March 22, 2011 11:54 AM
To: Stanley Hsiao
Subject: RE: Scotts/NCA Biotech

Just following up on this.

From: Maynard, John Gary
Sent: Wednesday, March 16, 2011 1:49 PM
To: 'Stanley Hsiao'
Cc: Maynard, John Gary
Subject: RE: Scotts/NCA Biotech

Mr. Hsiao:

Yes, you understand correctly. Scotts accepted your offer on terms that required no payment of money. We have an agreement on all material terms, as memorialized by the draft agreement I sent you on January 14. Scotts is not willing to discard that agreement and renegotiate a new one.

From: Stanley Hsiao [mailto:stanleyth@cpbio.com]
Sent: Wednesday, March 16, 2011 12:57 PM
To: Maynard, John Gary
Subject: RE: Scotts/NCA Biotech

John,

Let me know if I understand you correctly. The email you indicated contains such language as follows:

As that email indicates, you were willing to enter into the Settlement Agreement provided Scotts paid you \$6,000, or it withdrew the language of the Agreement requiring NCA to recognize Scotts' rights in the GRO mark. The Scotts has elected the latter.

So is it correct that your position is that you will not pay NCA Biotech any amount if you are to sign an agreement similar to what I revised?

Stanley

From: Maynard, John Gary [mailto:jgmaynard@hunton.com]
Sent: Wednesday, March 16, 2011 8:36 AM
To: stanleyth@cpbio.com
Cc: Maynard, John Gary
Subject: Scotts/NCA Biotech

Mr. Hsiao

Thanks for the email and revised document. Unfortunately, you have misunderstood Scotts' position. As I outlined in my email of January 14, 2011, attached above for your convenience, NCA Biotech offered to settle this matter in one of two different ways: (i) Scotts agrees to pay you \$6,000, or (ii) Scotts withdraws the language of the Agreement requiring NCA Biotech to recognize Scotts' rights in the GRO mark. Scotts accepted NCA Biotech's offer by electing the second option, and on January 14, 2011, I forwarded you a revised agreement that reflected the parties' agreement on all material terms.